

## **Memorandum on the Jurisdiction of the Forensic Science Commission (FSC)**

At the April 23, 2010 meeting of the FSC, commission members requested a legal opinion as to the investigative scope of the FSC. Concerns have been raised about the meaning of various words and phrases as applied to the FSC's investigative work. This memorandum was prepared in response to that request and has been drafted, reviewed and edited through the combined efforts of counsel for the Attorney General's Office, the Office of Court Administration and the Department of Public Safety, along with the two members of the FSC who are lawyers. The memorandum can serve as a reference for FSC members in addressing legal issues that arise during the screening of complaints, the work of investigative panels and the preparation of reports by the FSC.

In particular, the FSC seeks clarification of its limited jurisdiction to investigate pursuant to article 38.01, section 4(a)(3), of the Code of Criminal Procedure, which provides (emphasis added):

The commission shall investigate, in a timely manner, any allegation of *professional negligence or misconduct* that would substantially affect the integrity of the results of a *forensic analysis* conducted by an *accredited laboratory, facility or entity*.

### **Legislative History**

In 2003, the Legislature resolved the issue of how to accredit a "crime laboratory or other entity conducting the [forensic] analysis" by passing House Bill 2703. That bill conditioned the admission of evidence in a criminal action upon the examining or testing laboratory or entity being accredited.<sup>1</sup> The bill also delegated to DPS the responsibility for accrediting "crime laboratories ... and other entities" and authorized DPS to establish rules for that process.<sup>2</sup>

The FSC was created in 2005 by the 79<sup>th</sup> Regular Session of the Texas Legislature in House Bill 1068 and is codified in article 38.01 of the Code of Criminal Procedure. As passed, HB 1068 was a 36-page omnibus bill, dealing with several separate criminal justice issues. To understand how HB 1068 ultimately came to include the FSC, it is important to examine the combined efforts from several competing bills and the negotiation of differences between Senate and House members.

Legislation creating the FSC was originally contained in Senate Bill 1263, authored by Senator John Whitmire.<sup>3</sup> In the version of SB 1263 that passed the Senate, the bill limited the FSC's investigation of negligence or misconduct related to a "forensic analysis" arising from "an accredited laboratory, facility or entity."

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<sup>1</sup> See Tex. Code Crim. Pro. art. 38.35(d).

<sup>2</sup> Tex. Gov. Code § 411.0205(b).

<sup>3</sup> Senator Hinojosa later joined as a co-author.

The same bill also placed authority for accreditation of a laboratory, facility or entity in the FSC. However, when SB 1263 was voted out of the House Law Enforcement Committee, the word “accredited” was dropped, thereby placing no limit on the type of laboratory, facility or entity subject to investigation. The House committee substitute bill also dropped authority for the FSC to accredit a laboratory, facility or entity, shifting back such authority to the Department of Public Safety (DPS). This version of the bill died in the Calendars Committee without further consideration.

HB 1068, authored by Rep. Joe Driver, passed in the House with no mention of the FSC. The bill, among other subjects, addressed expansion of the accreditation process already in place through DPS.

Senator Hinojosa sponsored HB 1068 in the Senate, and it passed out of the Senate Criminal Justice Committee. During floor debate, Senator Hinojosa amended HB 1068, adding the language creating the FSC that came from SB 1263. The amendment included use of the word “accredited” to limit the type of laboratory, facility or entity subject to investigation. HB 1068 passed the Senate in that form. However, the House refused to concur in the changes made by the Senate to the bill.

Yet another version of HB 1068 emerged from a conference committee; the bill created the FSC but, notably, the word “accredited” was included in describing a laboratory, facility or entity subject to investigation by the FSC. The Senate and House approved the final version of HB 1068 that emerged following the negotiations in conference committee. The Governor signed the bill on June 18, 2005, making the new law effective on September 1, 2005.<sup>4</sup> No changes to article 38.01 have been made since that date.

### **Statutory Interpretation**

In focusing on the meaning of a statute, the FSC should apply standard and well-accepted statutory construction principles. For a discussion of how to apply those principles, see *Boykin v. State*, 818 S.W.2D 782, 785-86 (Tex. Crim. App. 1991). Among those principles, the following is likely most relevant: if the Legislature has chosen to define words or phrases in a specific way, then the FSC should apply those definitions, and not a common or more general understanding of the words or phrases.

### **“Professional Negligence or Misconduct”**

The Legislature did not provide a definition of the phrase “professional negligence or misconduct” in the statutory authority for the FSC. It is possible the phrase was

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<sup>4</sup> Acts 2005, 79<sup>th</sup> Leg., ch. 1224, § 23. The effective date language in the signed bill seemingly requires a prospective-only application of the new law. Acts 2005, 79<sup>th</sup> Leg., ch. 1224, § 22. However, this language was likely written only with matters other than the FSC in mind. This memorandum does not attempt to resolve the meaning of that conflicting language.

borrowed from federal legislation encouraging states to adopt a process for conducting independent, external investigations of various forensic, law enforcement and medical facilities.<sup>5</sup> A reference to that law was originally included in a bill analysis for SB 1263, the original 2005 bill drafted to create the FSC, but was dropped in subsequent versions of the bill analysis. The federal legislation also does not provide a definition of the phrase “professional negligence or misconduct”.

Members of the FSC initially discussed the need for a definition of the phrase “professional negligence or misconduct” but decided not to define the phrase. However, in January 2010, the FSC revisited the subject and adopted definitions as part of FSC written policies and procedures. See FSC Policies and Procedures 1.2.

### “Forensic Analysis”

The Legislature, through the Code of Criminal Procedure, provided the FSC with a very specific definition of “forensic analysis”:

a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. The term includes an examination or test requested by a law enforcement agency, prosecutor, criminal suspect or defendant, or court.<sup>6</sup>

That definition had previously been established by the Legislature in 2003 and amended in 2005 (in the same bill that established the FSC) for the express purpose of narrowing the admissibility of *certain* types of forensic evidence by requiring that the examination or testing occur only in an *accredited* laboratory or entity.

This general definition of forensic analysis is further restricted by statutory language and administrative rules promulgated by DPS that specify forensic disciplines that are expressly *included or excluded* from this general definition.

**Included.** A list of the types of examinations and tests subject to accreditation is contained in the administrative rules promulgated by DPS and include:

- DNA;<sup>7</sup>
- controlled substances, including the subdisciplines of marijuana, precursor analysis, and clandestine laboratory analysis;
- toxicology, including the subdisciplines of forensic toxicology, urine drug testing, and blood alcohol analysis;

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<sup>5</sup> See 42 U.S.C. 3739k(4) (using phrase “serious negligence or misconduct”).

<sup>6</sup> Tex. Code Crim. Pro. art. 38.01, section 2.

<sup>7</sup> See 37 Tex. Admin. Code Part 1, Ch. 28, Subch. F, Rule 28.92.

- biology, including the subdisciplines of biology, serology and DNA;
- firearms/toolmarks, including the subdisciplines of firearms, ballistics and toolmarks;
- questioned documents including the subdisciplines of questioned documents, handwriting and ink analysis;
- trace evidence, including the subdisciplines of fire debris, explosives, fibers, gun shot residue, glass, hairs, paint, filaments and unknown substances; and
- other disciplines and related subdisciplines if accredited by a recognized accrediting body and the director of the DPS.<sup>8</sup>

**Excluded.** The Legislature expressly excluded certain types of examination or test from the definition of forensic analysis. For example, the following specific types are listed as being excluded:

- latent print examination;
- breath samples for intoxication offenses investigated through the Transportation Code;
- digital evidence;
- a presumptive test for determining compliance with a condition of probation or parole and conducted by or under contract with a probation department, the parole division of the Texas Department of Criminal Justice or the Parole Board;
- or an examination or test conducted principally for scientific research, medical practice, civil or administrative litigation or any other purpose unrelated to a criminal action; and
- an autopsy conducted by a medical examiner or forensic pathologist who is a licensed physician.<sup>9</sup>

In addition, the Legislature authorized DPS to exclude other forensic disciplines, based on certain standards, through the adoption of an administrative rule.<sup>10</sup> DPS subsequently promulgated administrative rules excluding the following disciplines from the definition of forensic analysis:

- forensic photography;
- non-criminal paternity testing;

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<sup>8</sup> See 37 Tex. Admin. Code Part 1, Ch. 28, Subch. I, Rule 28.145.

<sup>9</sup> Tex. Code Crim. Pro. art. 38.35(a)(4)(A-C & E-F) & (f).

<sup>10</sup> Tex. Gov. Code § 411.025(c)(1-3).

- non-criminal testing of human or nonhuman blood, urine or tissue;
- a crime search team that does not engage in forensic analysis but only in locating, identifying, collecting or preserving physical evidence;
- evidence processing or handling excluded by article 38.35, Code of Criminal Procedure;
- sexual assault examination of the person;
- forensic anthropology, entomology or botany;
- environmental testing;
- facial or traffic accident reconstruction;
- serial number restoration;
- polygraph examination;
- voice stress, voiceprint or similar voice analysis;
- forensic hypnosis;
- statement analysis;
- profiling; and
- any other discipline or subdiscipline exempted by the director of the DPS.<sup>11</sup>

By providing a specific definition of “forensic analysis”, the Legislature expressly narrowed the forensic disciplines subject to accreditation by the DPS. By applying that same restrictive definition in the legislation creating and describing the role of the FSC, the Legislature clearly intended that the FSC focus only on those forensic disciplines identified as appropriate for accreditation by the DPS.

**“Accredited laboratory, facility or entity”**

Before the creation of the FSC, the Legislature had already established a clear and specific meaning of the phrase “accredited laboratory, facility or entity” by designating DPS as the agency ultimately responsible for accrediting crime laboratories before certain physical evidence subjected to forensic analysis could be admitted in a criminal action.<sup>12</sup> By including the word “accredited” in describing the

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<sup>11</sup> 37 Tex. Admin. Code Part 1, Ch. 28, Subch. I, Rules 28.146-147.

<sup>12</sup> See Tex. Code Crim. Pro. art. 38.35 (establishing requirement that certain forensic evidence must be examined or tested in a crime laboratory accredited by the public safety director of DPS); Tex. Gov. Code § 411.0205 (authorizing DPS to establish process for accrediting crime laboratories); 37 Tex. Admin. Code Part 1, Ch. 28,

types of “laboratories, facilities or entities” subject to the FSC’s investigative authority, the Legislature clearly intended the process by which the state, through DPS, recognizes only certain crime laboratories as qualified to conduct only certain forensic analyses for use as evidence in criminal courts.

“Crime laboratory” is defined by the Legislature as “a public or private laboratory or other entity that conducts a forensic analysis subject to [article 38.35, Code of Criminal Procedure]”.<sup>13</sup> The Legislature referenced that same definition of “crime laboratory” when establishing DPS accreditation authority.<sup>14</sup> The Legislature also applied identical definitions of “forensic analysis” and “physical evidence” within the various statutes creating the FSC, limiting admissibility of forensic evidence and establishing DPS accreditation authority.<sup>15</sup> Such conformity in definitions across these statutes makes it clear that the Legislature intended for the use of the term “accredited” also to have the same meaning applied in all of those statutes.

As described by the Court of Criminal Appeals, legislative interpretation demands that we “focus our attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment.”<sup>16</sup> Applying normal rules of grammar, the word “accredited” modifies the entire phrase “laboratory, facility or entity,” thereby limiting the FSC to investigating claims of professional negligence or misconduct that allegedly occurred in a laboratory, facility or entity that has been recognized by DPS as qualified to conduct the analysis.

## **Conclusion**

Taken together, the application of the phrases “forensic analysis” and “accredited laboratory, facility or entity” describe the relatively narrow investigative jurisdiction and authority of the FSC. The FSC does not have the discretion or power to accept and investigate any and every complaint alleging professional negligence or misconduct involving a forensic science. Before conducting an investigation, therefore, the FSC should confirm that the complaint focuses on evidence:

- collected or used in a criminal action;
- examined or tested through a forensic discipline or subdiscipline recognized by DPS for accreditation; and

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Subch. I, Rule 28.141 (describing purpose and scope of DPS accreditation process).

See also note 4, ante.

<sup>13</sup> Tex. Code Crim. Pro. art. 38.35(a)(1).

<sup>14</sup> Tex. Gov. Code section 411.0205(a).

<sup>15</sup> Tex. Code Crim. Pro. arts. 38.01, section 2 & 38.35(a)(4-5); Tex. Gov. Code section 411.0205(a).

<sup>16</sup> *Boykin v. State*, 818 S.W.2D 782, 785-86 (Tex. Crim. App. 1991).

- arising from an examination or test conducted through a laboratory, facility or entity accredited by DPS.

By applying these minimum conditions, the FSC can make sure that investigations are conducted pursuant to its jurisdiction and authority.